



United States General Accounting Office
Washington, DC 20548

Comptroller General
of the United States

Decision

Matter of: Carr's Wild Horse Center

File: B-285833

Date: October 3, 2000

David B. Dempsey, Esq., Piper Marbury Rudnick & Wolfe, for the protester.
Sherry K. Kaswell, Esq., and Alton E. Woods, Esq., Department of the Interior, for the agency.
Linda C. Glass, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Under solicitation contemplating award of multiple indefinite-delivery/indefinite-quantity contracts for handling horses/burros at adoption events, protest that minimum guaranteed quantity of 100 horses/burros for life of contract is insufficient consideration to bind parties is denied where nature of acquisition dictates possibility that government may order only this quantity, and where other factors surrounding acquisition show an intent to form binding contracts.
 2. Solicitation will not result in impermissible personal services contract where under contract government will not exercise continuous supervision and control over contractor personnel performing the contract.
-

DECISION

Carr's Wild Horse Center protests the terms of request for proposals (RFP) No. NAR-00052, issued by the Department of Interior, Bureau of Land Management (BLM), for services related to the conduct of satellite (temporary) adoptions of animals under BLM's horse and burro program. Carr's contends that the solicitation is defective for a variety of reasons.

We deny the protest.

The RFP, issued as a small business set-aside, contemplates the award of a fixed-priced, indefinite-delivery/indefinite-quantity (ID/IQ) contract for a base year, with two 1-year options. The contractor is to provide assistance to BLM in conducting satellite adoptions. These satellite adoptions (including travel and set-

up) will be 2- to 6-day events at various locations in the eastern United States. In Type I events, BLM will require only set-up and feeding services, and BLM personnel will perform wrangling duties. In Type II events, BLM will require the contractor to set up equipment, feed animals, and perform wrangling. At all satellite adoptions, BLM will process adoption applications, help potential adopters select animals, collect adoption fees, and issue maintenance and care agreements.

The RFP provides for award on a best value basis, with technical merit significantly more important than price. As relevant here, the RFP provides for the evaluation of price reasonableness and, as necessary, the evaluation of the realism of proposed prices. The RFP also provides a procedure for conducting a price realism evaluation. The RFP sets forth a minimum guaranteed quantity of 100 animals for the life of the contract and a maximum quantity of 10,000 animals during the life of the contract. The solicitation also allows for the award of multiple contracts. BLM will issue individual delivery orders based upon technical approach, price, and past performance. Proposals were to be submitted by July 12, 2000.¹

On July 3, Carr's, the incumbent contractor, filed an agency-level protest challenging numerous solicitation provisions. Prior to the agency's response, Carr's filed a timely protest with our Office on July 12.

The protester contends that the solicitation should be issued as a requirements contract and not as an ID/IQ contract because the proposed ID/IQ contract lacks consideration.² Specifically, the protester argues that the RFP's minimum guaranteed quantity of 100 animals is nominal and that any resulting contract would be illusory and unenforceable because it lacks consideration. It is the protester's position that a 100-animal minimum for the entire contract period is a nominal amount because based on historical data, prior year contracts involved more than 100 animals at each adoption.³

¹ Carr's and other firms have submitted proposals and the agency is in the process of evaluating them. Carr's, in its proposal, took no exception to the solicitation provisions. Contracting Officer's Statement at 2.

² In its comments filed with our Office on August 24, Carr's withdrew several protest issues concerning acquisition planning, ombudsman information, key personnel, the evaluation team, and the evaluation factors.

³ The protester also argues that the historical data showing the number of animals processed by year and locality as provided in the solicitation is inadequate because it does not include the number of animals actually adopted. However, contractors are to be reimbursed for the number of animals handled, not the number adopted. We therefore fail to see how offerors are prejudiced by the failure of BLM to include the number of animals actually adopted (this is particularly true for Carr's, because it, as the incumbent, presumably has access to that information). Moreover, the protester
(continued...)

The agency argues that its choice of contract type was proper, appropriate, and in accordance with FAR §16.504 governing use of ID/IQ contracts. The agency states that it has a recurring need for animal adoptions and that it cannot precisely determine the exact number of adoptions that it will require, since the number of adoptions varies significantly from month to month and year to year. The agency also states that its guaranteed minimum is reasonable because the average number of animals at any given adoption is approximately 100 animals.

An ID/IQ contract requires the government to order and the contractor to furnish at least a stated minimum quantity of supplies or services and, if ordered, the contractor to furnish any additional quantities, not to exceed a stated maximum. FAR §16.504(a)(1). In order to be binding, the minimum quantity must be more than a nominal quantity but should not exceed the amount the government is fairly certain to order. FAR §16.504(a)(2). In other words, an ID/IQ contract is binding so long as the buyer agrees to purchase from the seller at least a guaranteed minimum quantity of goods and services; the stated minimum quantity forms the consideration for the contract. Sea-Land Serv., Inc., B-278404.2, Feb. 9, 1998, 98-1 CPD ¶ 47 at 11. Since the prohibition against a nominal minimum quantity is designed to ensure that the intent to form a binding contract is present, the determination whether a stated minimum quantity is nominal must consider the nature of the acquisition as a whole. Id. at 12.

While Carr's contends that the quantity of 100 animals for the life of the contract is insufficient consideration, the historical data indicates that this quantity is not insufficient or nominal. The data shows that there is a great disparity in the number of animals processed from year to year and at various adoption locations. For example, 96 and 98 animals were processed at Rutland, Vermont in 1997 and 1998, respectively; however, no animals were processed at this location in 1996 and 2000.

(...continued)

raised this protest issue in its comments to the agency report filed with our Office on August 24, after the date for proposal submission; the protest ground is therefore untimely. A protest based on alleged improprieties apparent on the face of a solicitation must be filed with the contracting agency or our Office prior to the closing time set for receipt of proposals. Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (2000); Engelhard Corp., B-237824, Mar. 23, 1990, 90-1 CPD ¶ 324 at 7. In any event, for an ID/IQ contract, estimated maximum quantities should be realistic and based on the most current information available. Federal Acquisition Regulation (FAR) § 16.504(a)(1). These estimates need not be precise; rather, such estimates are unobjectionable so long as they were established in good faith or based on the best information available, and accurately represent the agency's anticipated needs. Howard Johnson, B-260080, B-260080.2, May 24, 1995, 95-1 CPD ¶ 259 at 3; International Tech. Corp., B-233742.2, May 24, 1989, 89-1 CPD ¶ 497 at 3-4. Here, we have no basis to question the estimates.

Agency's Rebuttal Comments at 1. At Windom, Minnesota, 158 animals were processed in 1997, while only 97 were processed in 1998. At a third location, 237 animals were processed in 1997, 185 in 1998, 104 in 1999, and 73 in 2000. Id. The record shows that BLM has a recurring need for animal adoptions and that the 100-animal minimum guarantee is not out of line with the numbers handled at previous adoption events. Here, multiple awards are contemplated and there is no certainty that individual contractors will assist and handle more than the minimum guaranteed quantity of 100 animals. Considering all of the circumstances here and the historical data, we cannot conclude that the stated minimum quantity for the life of the contract represents insufficient consideration to form a binding contract.

The protester next contends that the agency's failure to include the appropriate Department of Labor (DOL) wage determination in the solicitation violates the Service Contract Act of 1965 (SCA), 41 U.S.C. §§ 351-358 (1994), and makes it impossible for any offeror to properly anticipate labor costs. The protester maintains that without the appropriate wage determination available as a method of leveling the playing field, an offeror with better geographic proximity and experience with that location will have a competitive advantage over the remaining offerors in preparing its proposal.

The contracting officer requested that DOL provide wage rates for the states set forth in the solicitation. Contracting Officer's Statement at 5. Offerors were advised, in attachment A to section J of the solicitation, that the wage rates had been requested and would be forwarded when received. The agency contends that the SCA provision at FAR § 52.222-41, incorporated by reference in the solicitation, provides more than adequate direction for offerors to estimate applicable wages for proposal purposes.

Here, the agency complied with its obligation to obtain a wage determination for inclusion in the solicitation. While the absence of particular wage determinations might affect prices, all offerors are affected equally. Moreover, the wage determinations specify minimum wages; they are not a guarantee that a firm can employ the appropriate workforce at those rates. We think that some risk is inherent in projecting costs, and firms are expected to allow for that risk in computing their offers. PacOrd, Inc., B-253690, Oct. 8, 1993, 93-2 CPD ¶ 211 at 11; see West Coast Fire Serv., Inc., B-228170, Dec. 16, 1987, 87-2 CPD ¶ 599 at 2. Further, to the extent the protester argues that offerors, because of their geographic proximity to certain locations may have a competitive advantage in preparing wage and fringe benefits estimates, there is no requirement that an agency equalize a competitive advantage that a firm may enjoy because of its own particular business circumstances where those advantages do not result from a preference or unfair action by the government. Geographic Resource Solutions, B-260402, June 19, 1995, 95-1 CPD ¶ 278 at 3.

Carr's also objects to the solicitation provision for the submission of cost or pricing data on the grounds that the acquisition of commercial services is exempt from the requirement for the submission of cost or pricing data. The agency maintains that

the services--the handling of wild horses and burros--are not commercial services as defined by FAR § 2.101 because the services being procured are not “[s]ervices of a type offered and sold competitively in substantial quantities in the commercial marketplace based on established catalog or market prices for specific tasks performed under standard commercial terms and conditions,” and that the contracting officer, in her discretion, properly included the cost or pricing data provision.

We have no basis to object to the contracting officer’s decision that she was not buying a commercial item as defined in the FAR. Other than to disagree with this decision, the protester provides no information that establishes that the contracting officer’s determination is incorrect, and on this record, we have no basis to question that decision. As a result, the cost or pricing data provision was appropriately included in the solicitation. Furthermore, as the agency points out, the solicitation permits offerors to seek an exemption to the requirement for the submission of cost or pricing data if they believe they can establish that these services are commercial. RFP § L.8. An offeror can still make its case for an exemption to the contracting officer. Agency Report at 8.

The protester next contends that the agency failed to conduct market research as required by FAR §§ 10.001 and 10.002. The FAR provisions generally require agencies to conduct market research appropriate to the circumstances. FAR § 10.001(a)(2). The record here shows that the contracting officer has been responsible for the wild animal adoption program for approximately 10 years. Prior to issuing the solicitation, the contracting officer contacted knowledgeable individuals, both within industry and government, to obtain information regarding market capabilities as well as input on specifications and acquisition methods. Contracting Officer’s Statement at 8. The contracting officer also performed market research via the Internet and contacted horse trainers, auction houses, and other concerns that deal with livestock to seek out potential sources for the required services. Agency Report at 9. The FAR recognizes that the extent of market research varies depending on such factors as estimated dollar value, complexity, and past experience. FAR § 10.002(b)(1). Appropriate techniques for market research include contacting knowledgeable individuals and participating in interactive, on-line communication among industry acquisition personnel and customers. FAR § 10.002(b)(2). On the basis of this record, we believe the agency’s market research procedures adequately complied with the requirements of the FAR. In any event, the protester has not shown how the firm was prejudiced by the allegedly inadequate market survey. In other words, we do not see how any perceived inadequacy in the market survey affects the protester’s ability to compete. See, e.g., Johnson Controls World Servs., Inc., B-285144, July 6, 2000, 2000 CPD ¶ 108 at 2-4.

Next, the protester contends that the solicitation impermissibly calls for a cost realism analysis. This allegation is factually erroneous. As stated above, the RFP price evaluation factor provides for the evaluation of the reasonableness and, as necessary, the realism of proposed prices. RFP § M.3. Thus, the RFP, by its terms,

does not require any cost realism evaluation. Further, an agency at its discretion may provide for a price realism analysis in the solicitation of fixed-price proposals, even those set aside for small business concerns, since the risk of poor performance when a contractor is forced to provide services at little or no profit is a legitimate concern in evaluating proposals. Science & Tech., Inc.; Madison Servs., Inc., B-272748 et al., Oct. 25, 1996, 97-1 CPD ¶ 121 at 16. The depth of an agency's price realism analysis is a matter within the sound exercise of the agency's discretion. Id. We simply have no basis to object to the agency's requirement in this regard.

The protester next contends that the solicitation language indicates that BLM is soliciting for a personal services contract. The protester maintains that by retaining in-house functions related to the adoption services,⁴ BLM will create a situation where a personal services contract will come into existence because contractor personnel will be subject to the relatively continuous supervision and control by a government officer or employee during contract performance. The agency maintains, however, that the solicitation provisions plainly and unambiguously indicate that the contractor, not the government, will have the duty of overseeing its employees and coordinating performance with the contracting officer or her representative. A personal services contract is one that, by its express terms or as administered, makes the contractor personnel appear, in effect, government employees. FAR §§ 37.101, 37.104. The government is normally required to obtain its employees by direct hire under competitive appointment or other procedures required by the civil service laws. FAR § 37.104(a). Obtaining personal services by

⁴ The protester contends that BLM's decision to perform certain of the adoption activities with in-house personnel violates OMB Circular No. A-76 and the Federal Activities Inventory Reform (FAIR) Act of 1998, 31 U.S.C. § 501 note (Supp. IV 1998), in that BLM personnel are performing services that contractor personnel had performed under prior contracts. The protester maintains that BLM should conduct a commercial activities study.

OMB Circular No. A-76 describes the executive branch's policy on the operation of commercial activities that are incidental to the performance of government functions. It outlines procedures for determining whether commercial activities should be operated under contract by private enterprises or in-house using government facilities and personnel. Our Office reviews A-76 decisions only if they resulted from an agency's issuance of a competitive solicitation for the purpose of comparing the cost of private and governmental operation of the commercial activity to determine whether the comparison was conducted reasonably. Madison Servs., Inc., B-277614, Nov. 3, 1997, 97-2 CPD ¶ 136 at 4. BLM's solicitation does not involve an A-76 cost comparison, and we therefore have no basis to consider the matter. Moreover, we note that the FAIR Act does not address, let alone expand, the scope of our review authority in any way. See American Fed'n of Gov't Employees, AFL-CIO; et al., B-282904.2, June 7, 2000, 2000 CPD ¶ 87 at 7.

contract, rather than by direct hire, circumvents those laws unless Congress has specifically authorized acquisition of the services by contract. Id. Agencies should not award personal services contracts unless specifically authorized by statute to do so. FAR § 37.104(b).

Whether a solicitation would result in a personal services contract must be judged in the light of its particular circumstances, with the key question being whether the government will exercise relatively continuous supervision and control over the contractor personnel performing the contract. FAR § 37.104(c)(2); Information Ventures, Inc., B-241641, Feb. 14, 1991, 91-1 CPD ¶ 173 at 4.

We do not believe the requirements of this contract will create an employer-employee relationship between the government and the contractor's personnel. The protester appears to suggest, without providing any examples, that BLM's performance of normal contract administration functions, such as quality assurance requirements, will result in an improper personal services contract. To the contrary, the solicitation provides specifications for performance of the requirements by the contractor and provides that it is the contractor's responsibility to provide administrative support for its personnel's performance of the requirement. RFP § G.7. The solicitation, in fact, prohibits the contracting officer's representative from providing any direction which interferes with the contractor's right to perform the terms and conditions of the contract. RFP § H.6(s). We agree with the agency that the contractor has ultimate control in determining how best to fulfill its contractual obligations. This protest ground is without merit.

The protest is denied.

Anthony H. Gamboa
Acting General Counsel